DANAHARTA URUS SDN BHD

v.

KEKATONG SDN BHD

FEDERAL COURT, KUALA LUMPUR
AHMAD FAIRUZ CJ
MOHD NOOR AHMAD FCJ
PAJAN SINGH GILL FCJ
RAHMAH HUSSAIN FCJ
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: 02-17-2003 (W)]
27 JANUARY 2004

CONSTITUTIONAL LAW: *Legislation - Validity - Section 72 Pengurusan Danaharta Nasional Berhad Act 1998 - Prohibits court from granting injunction against Danaharta Urus Sdn Bhd in any circumstances - Constitutionality of s. 72 - Whether right of access to justice denied - Whether right subject to modifications - Whether requirements for reasonable classification test satisfied - Whether Court of Appeal erred in deciding s. 72 unconstitutional - Federal Constitution, arts. 8(1), 121(1), 160(2) - Civil Law Act 1956, s. 3(1)*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Whether court empowered to grant injunction against Danaharta Urus Sdn Bhd - Pengurusan Danaharta Nasional Berhad Act 1998, s. 72 - Federal Constitution, arts. 8(1), 121(1), 160(2) - Civil Law Act 1956, s. 3(1)*

STATUTORY INTERPRETATION: *Construction of statutes - Section 72 Pengurusan Danaharta Nasional Berhad Act 1998 - Prohibits court from granting injunction against Danaharta Urus Sdn Bhd in any circumstances - Whether s. 72 contravenes arts. 8(1) of Federal Constitution - Whether art. 8(1) subject to s. 3(1) Civil Law Act 1956 - Whether s. 72 satisfies requirements of reasonable classification test*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - To restrain Danaharta Urus Sdn Bhd from selling charged land - Whether court has no jurisdiction to grant injunction in view of s. 72 Pengurusan Danaharta Nasional Berhad Act 1998 - Federal Constitution, arts. 8(1), 121(1), 160(2) - Civil Law Act 1956, s. 3(1)*

Kekatong Sdn Bhd (the respondent herein) applied for an interlocutory injunction against Danaharta Urus Sdn Bhd (the appellant herein) to restrain it from selling its charged land under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). The High Court dismissed the application on the ground that there was no serious question to be tried and that s. 72 of the Act barred the court from granting the injunction against the appellant. The respondent appealed to the Court of Appeal ('CA') which held that there were serious questions to be tried and that s. 72 of the Act contravened art. 8(1) of the Federal Constitution ('the Constitution') and was therefore unconstitutional. As such, the appeal was allowed and an interlocutory injunction was ordered against the appellant. The appellant now appealed to the Federal Court, the issues being whether s. 72 of the Act was unconstitutional, and whether the CA was correct in granting the interlocutory injunction as prayed for by the respondent.

Held:

Per Augustine Paul JCA

[1] The CA held that the right of access to justice was common law within the definition of "law" under art. 160(2) of the Constitution, thereby making it an integral part of art. 8(1) of the same with the result that it was a guaranteed fundamental right that was absolute. However, the common law referred to in art. 160(2) is the common law that was brought into operation in the Federation via s. 3(1) of the Civil Law Act 1956 ('CLA'). Section 3(1) CLA clearly envisaged the modification of such common law in the future. To that extent the right of access to justice was not absolute but qualified. Further, as the common law right of access to justice into art. 8(1) is dependant on any contrary provision that may be made by any written law as provided by s. 3(1) CLA, it cannot amount to a guaranteed fundamental right. (pp 713 f, 714 a, 715 i & 716 a-b)

[2] The CA read art. 8(1) of the Constitution in isolation with complete focus on the rights enshrined therein and with little regard for art. 121(1) of the same. Access to justice under art. 8(1) is a general right that can be fulfilled only by laws enacted conferring jurisdiction and powers on the courts under the specific authority contained in art. 121(1) of the Constitution. It followed that art. 8(1) and art. 121(1) of the Constitution are not in conflict but complement each other. Art. 8(1), therefore, cannot be read in isolation. (pp 717 a & 719 c-d)

[3] Section 72 of the Act is a federal law made by Parliament under the authority and scope of art. 121(1) of the Constitution. As it deals with the jurisdiction of the court it is a "written law" within the meaning of s. 3(1) CLA in so far as the common law right of access to justice contained therein is concerned. It is one that modifies the common law right of access to justice as permitted by s. 3(1) CLA. The modified right of access to justice will then be the common law in operation for the purpose of art. 160(2) of the Constitution. (p 720 b)

[4] The phrase "equal protection of the law" in art. 8(1) of the Constitution does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. There must be a subjection to equal laws applying alike to all persons in the same situation. The validity of a law relating to equals can therefore only be properly tested if it applies alike to all persons in the same group. This can only be ascertained by the application of the doctrine of classification that must be a reasonable classification. A law can be struck down as being discriminatory, arbitrary or unfair only if it is not based on a reasonable or permissible classification. (pp 724 a, 725 c & 727 a)

[5] The Act was passed by Parliament in July 1998 following the July 1997 financial and economic crisis that hit Malaysia along with a few other Asian countries. Parliament enacted the Act to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions. The appellant was empowered to sell charged lands by private treaty without securing the usual court order as banks and other secured lenders are obliged to do under the National Land Code. Sales of these properties would be substantially delayed if injunctive relief was available. Therefore, s. 72 was introduced into the Act via an amendment in September 2000 to enable the appellant to carry out its operations more speedily so as to achieve its objectives without being inundated, saddled or slowed down by applications for injunctions with its inherent delay. Section 72 applies to all persons in the same position as the respondent. Thus, it applies equally to all persons who are similarly circumstanced. (pp 737 a-c, 739 f, 740 b-f & 741 f)

[6] There will be a violation of art. 8 of the Constitution only if a legislation does not apply to a person who is similarly circumstanced as the other persons in the classification – and not to someone like the appellant outside it. The conclusion of the CA was wholly unsustainable as it was a total deviation from the law regulating art. 8(1) of the Constitution. There was a rational basis between the classification in s. 72 and its object in relation to the Act. Section 72 therefore satisfies the requirements of the reasonable classification test and is not unconstitutional. (pp 741 h & 742 a)

[Appeal allowed; injunctive relief against appellant to be vacated.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Kekatong Sdn Bhd (responden di sini) telah memohon injunksi interlokutori terhadap Danaharta Urus Sdn Bhd (perayu di sini) bagi menghalang tanah yang digadainya dari dijual di bawah Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta'). Mahkamah Tinggi menolak permohonan atas alasan bahawa tidak terdapat persoalan serius yang boleh dibicarakan dan bahawa s. 72 Akta menghalang mahkamah dari mengeluarkan injunksi terhadap perayu. Responden merayu ke Mahkamah Rayuan ('CA') yang berpendapat bahawa terdapat persoalan serius yang perlu dibicarakan dan bahawa s. 7(2) Akta adalah tidak berperlembagaan kerana bertentangan dengan fasal 8(1) Perlembagaan Persekutuan ('Perlembagaan'). Berikutnya rayuan dibenarkan dan injunksi interlokutori dikeluarkan terhadap perayu. Perayu kini merayu ke Mahkamah Persekutuan sekaligus membangkitkan isu sama ada s. 72 Akta tidak berperlembagaan dan sama ada CA betul bila memerintahkan injunksi interlokutori sepertimana yang dipohon responden.

Diputuskan:
Oleh Augustine Paul HMR

[1] CA memutuskan bahawa hak untuk mendapat akses kepada keadilan adalah merupakan undang-undang awam dalam lingkungan definasi "undang-undang" di bawah fasal 160(2) Perlembagaan, sekaligus menjadikannya satu bahagian penting fasal 8(1) Perlembagaan yang berakibat bahawa ia menjadi hak asasi yang mutlak. Bagaimanapun, undang-undang awam yang dirujuk oleh fasal 160(2) adalah undang-undang awam yang dibawa beroperasi ke dalam negara melalui s. 3(1) Akta Undang-Undang Sivil 1956 ('CLA'). Seksyen 3(1) jelas membayangkan modifikasi undang-undang awam tersebut di masa-masa akan datang. Maka setakat itu, hak untuk mendapat akses kepada keadilan tidaklah mutlak tetapi bersyarat. Lagipun, oleh kerana hak

untuk mendapat akses kepada keadilan di sisi undang-undang awam dalam fasal 8(1) bergantung kepada peruntukan sebaliknya yang mungkin di buat di bawah s. 3(1) CLA, ia tidak boleh menjadi satu hak asasi yang dijamin.

[2] CA membaca fasal 8(1) Perlembagaan secara bersendirian dengan memberi sepenuh tumpuan kepada hak-hak yang termaktub di dalamnya dan tidak sangat mengendahkan fasal 12(1) Perlembagaan. Laluan kepada keadilan di bawah fasal 8(1) adalah satu hak umum yang hanya boleh dipenuhi melalui penggubalan undang-undang yang memberikan bidangkuasa kepada mahkamah-mahkamah di bawah autoriti khas yang terkandung dalam fasal 12(1) Perlembagaan. Ianya mengikut bahawa fasal 8(1) dan fasal 12(1) Perlembagaan bukanlah bertentangan tetapi saling melengkapi. Fasal 8(1) dengan itu tidak boleh dibaca secara bersendirian.

[3] Seksyen 72 Akta adalah satu undang-undang persekutuan yang dibuat oleh Parlimen di bawah autoriti dan skop fasal 12(1) Perlembagaan. Oleh kerana ia memperkatakan tentang bidangkuasa mahkamah maka ia adalah "undang-undang bertulis" dalam ertikata s. 3(1) CLA setakat mana ianya berkait dengan hak undang-undang awam untuk mendapat akses kepada keadilan yang terkandung dalam seksyen itu. Ia mengubah hak undang-undang awam untuk mendapat akses kepada keadilan seperti yang dibenarkan oleh s. 3(1) CLA. Hak untuk mendapat akses kepada keadilan yang diubah itu kemudian akan menjadi undang-undang awam yang beroperasi bagi maksud fasal 160(2) Perlembagaan.

[4] Ungkapan "perlindungan yang sama rata di sisi undang-undang" dalam fasal 8(1) Perlembagaan tidak bermaksud bahawa semua undang-undang yang diluluskan oleh badan perundangan mesti dilaksanakan secara menyeluruh kepada semua orang dan bahawa undang-undang yang diluluskan itu tidak boleh mencipta perbezaan-perbezaan berhubung orang-orang ke atas mana ianya dilaksanakan atau berhubung sempadan kawasan dalam mana ianya berkuatkuasa. Harus ada satu pematuhan kepada undang-undang yang sama yang terlaksana secara yang sama kepada semua orang dalam satu-satu situasi. Kesahan sesuatu undang-undang yang berkaitan dengan orang-orang setaraf dengan itu hanya boleh diuji jika ia terpakai kepada semua orang dalam kumpulan yang sama. Ini hanya boleh dipastikan melalui pelaksanaan doktrin klasifikasi yang bersifat klasifikasi munasabah. Sesuatu undang-undang hanya boleh ditolak kerana bersifat diskriminasi, arbitrari atau tidak adil jika ianya tidak didasarkan kepada klasifikasi yang munasabah atau yang boleh diterima.

[5] Akta telah diluluskan oleh Parlimen pada Julai 1998 ekoran krisis ekonomi dan kewangan pada Julai 1997 yang menyerang Malaysia dan beberapa negara Asia lain. Parlimen menggubal Akta untuk memastikan bahawa pengambilan pinjaman-pinjaman tak berbayar oleh perayu akan mengurangkan tekanan ke atas bank-bank dan institusi-institusi kewangan yang lain. Perayu dibenarkan menjual tanah-tanah yang digadai melalui perjanjian persendirian tanpa perlu memperoleh perintah mahkamah sepertimana yang perlu dibuat oleh bank-bank serta peminjam-peminjam dijamin lain di bawah Kanun Tanah Negara. Penjualan tanah-tanah ini akan tergendala teruk jika relif injunksi boleh dibenarkan. Oleh itu, s. 72 telah diperkenalkan ke dalam Akta melalui satu pindaan pada September 2000 bagi membolehkan perayu menjalankan operasinya dengan lebih cepat bagi mencapai objektifnya tanpa harus dibeban atau diseret oleh permohonan-permohonan injunksi yang melengahkan. Seksyen 72 terpakai kepada semua orang yang berada dalam keadaan yang serupa sepertimana responden. Maka, ia terpakai secara sama rata kepada semua orang yang berada dalam keadaan sedemikian.

[6] Keingkaran terhadap fasal 8(1) Perlembagaan akan hanya berlaku jika sesuatu undang-undang itu tidak terpakai kepada seseorang yang berada dalam keadaan yang sama sepertimana orang-orang lain dalam satu-satu klasifikasi – dan bukan kepada seseorang yang berada di luarnya seperti perayu di sini. Rumusan CA langsung tidak boleh dipertahankan kerana ia adalah satu penyimpangan mutlak dari undang-undang yang mengawalselia fasal 8(1) Perlembagaan. Terdapat satu asas rasional antara pengklasifikasian dalam s. 72 dengan tujuan-tujuannya dalam hubungannya dengan Akta. Oleh itu, s. 72 memenuhi kehendak ujian klasifikasi munasabah dan bukanlah tidak berperlembagaan.

Rayuan dibenarkan; relif injunksi terhadap perayu digugurkan.]

Case(s) referred to:

Abdul Ghani Ali & Ors v. PP [1977] 2 MLJ 155 ***(refd)***
Ajay Hasia v. Khalid Mujid Sehravardi & Ors AIR [1981] SC 487 ***(refd)***
Ameerunnissa Begum v. Mahboob Begum AIR [1953] SC 91 ***(refd)***
Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd [1920] 28 CLR 129 ***(foll)***
Amato v. The Queen [1982] 140 DLR (3d) 405 ***(refd)***
Asiatic Engineering Co v. Achhru Ram AIR [1951] All 746 ***(refd)***
Bremer Vulken Schiffbau und Maschinenfabrik v. South India Shipping Corp [1981] 1 All ER 289 ***(refd)***
Budhan Choudhry v. State of Bihar AIR [1955] SC 191 ***(refd)***
Charanjit Lal v. Union of India AIR [1951] SC 51 ***(refd)***
Chiranjitlal v. Union of India AIR [1951] SC 41 ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1977] 2 MLJ 155 ***(refd)***

Debranjan Ray v. Comptroller and Accountant-General of India AIR [1985] SC 307 ***(refd)***
Deepak Sibal v. Punjab University AIR [1989] SC 903 ***(refd)***
Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***
Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs 1955 AIR [1954] SC 424 ***(refd)***
Dwarka Prasad v. State of Uttar Pradesh AIR [1954] SC 224 ***(refd)***
EP Royappa v. State of Tamil Nadu & Anor AIR [1978] SC 597 ***(refd)***
Federation of Hotel and Restaurant v. Union of India AIR [1990] SC 1637 ***(refd)***
Franky Construction Sdn Bhd v. MEC Industrial Park Sdn Bhd [2002] 6 MLJ 212 ***(refd)***
Hinds v. The Queen [1976] 1 All ER 353 ***(refd)***
John Vallamattom & Anor v. Union of India [2003] 3 LRI 169 ***(refd)***
Jyoti Pershad & Ors v. Administrator for the Union Territory of Delhi & Ors AIR [1961] SC 1602 ***(refd)***
Kathi Raning Rawat v. The State of Saurashtra AIR [1952] SC 123 ***(refd)***
Kedar Nath Bajoria v. State of West Bengal AIR [1953] SC 404 ***(refd)***
Linsley v. National Carbonic Gas Co [1911] 220 US 61 ***(refd)***
Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***
Malaysian Bar & Anor v. Government of Malaysia [1987] 2 MLJ 165 ***(refd)***
Maneka Gandhi v. Union of India & Anor AIR [1978] SC 597 ***(refd)***
Mian Bashir Ahmad & Ors v. The State AIR [1982] J & K 26 ***(refd)***
Mohd Ezam v. Ketua Polis Negara [2002] 4 CLJ 309 FC ***(refd)***
Moinuddin v. State of UP AIR [1960] All 484 ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
Phang Chin Hock v. PP [1980] 1 MLJ 70 ***(refd)***
Pierson v. Secretary of State for the Home Department [1997] 3 All ER 577 ***(refd)***
PP v. Khong Teng Khen & Anor [1976] 2 MLJ 166 ***(refd)***
PP v. Su Liang Yu [1976] 2 MLJ 128 ***(refd)***
Ram Prasad v. State of Bihar AIR [1953] SC 215 ***(refd)***
RC Cooper v. Union of India AIR [1970] SC 564 ***(refd)***
Re Special Courts Bill AIR [1979] SC 478 ***(refd)***
RK Garg v. Union of India AIR [1981] SC 2138 ***(refd)***
S v. Ntesang [1995] 4 BCLR 426 ***(refd)***
S Kulasingham & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 FC ***(refd)***
Sagir Ahmad v. Government of UP AIR [1954] All 257 ***(refd)***
Saurabh Chaudri & Ors v. Union of India [2003] 4 LRI 532 ***(refd)***
Sheoshanker v. State of MP AIR [1951] Nag 58 ***(refd)***
Shri Ram Krishna Dalmia & Ors v. Shri Justice SR Tendolkar & Ors AIR [1958] SC 538 ***(refd)***
Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee [2002] 4 CLJ 776 CA ***(refd)***
State of Bombay v. FN Balsra AIR [1951] SC 318 ***(refd)***
State of MP v. GC Mandawar [1955] SCR 599 ***(refd)***
State of Punjab v. Ajaib Singh AIR [1953] SC 10 ***(refd)***

State of WB v. Anwar Ali [1952] SC 75 ***(refd)***
State of West Bengal v. Anwar Ali Sarkar AIR [1952] SC 75 ***(refd)***
Vide Southern Railway Co v. Greene 216 US 400 ***(refd)***
VM Syed Mohammad & Company v. State of Andhra AIR [1954] SC 314 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)
Federal Constitution, arts. 5(1), 8(1), 14, 121(1), 160(2)
National Land Code, s. 372
Pengurusan Danaharta Nasional Berhad Act 1998, s. 72

Other source(s) referred to:
Bindra's Interpretation of Statutes, 7th edn, pp 947-948
Chaudhari & Chaturvedi, *Law of Fundamental Rights,* 4th edn, p 15
Seervai, *Constitutional Law of India,* 4th edn, vol I, p 439
Halsbury's Laws of England, 4th edn reissue, vol 8(2), para 141

For the appellant - Tommy Thomas (Sitpah Selvaratnam); M/s Tommy Thomas
For the respondent - Bastian Vendargon (T Gunaseelan & R Sarankapani); M/s Jayaraman, Ong & Co
For the intervener - Abdul Gani Patail (Azahar Mohamed, Mary Lim, Mohaji Selamat & Anita Fernandez)

[Appeal from Court of Appeal, Civil Appeal No: W-02-221-02]

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul JCA:

The facts of the case, as submitted by the parties, are that pursuant to a loan agreement dated 28 May 1983 Bank Bumiputra Malaysia Berhad ("the bank") granted a RM30 million loan in US dollar equivalent to Kredin Sdn Bhd ("Kredin"). The loan was secured, *inter alia,* by a third party charge over a piece of land created by Kekatong Sdn Bhd ("the respondent") in favour of the bank. The charge was registered in the land office on 28 May 1983. One Raju Kerpaya Jayaraman, an advocate and solicitor of the High Court of Malaya practising under the name and style of Jayaraman, Ong & Co, is, and was at all material times, the principal shareholder and controlling director of both the respondent and Kredin. By reason of Kredin's default in settling the loan judgment was entered in favour of the bank on 1 April 1986 for the principal sum of US$17,771,319.06 together with interest thereon in Kuala Lumpur High Court Civil Suit No S23-436-86. The judgment is significant because it confirms the indebtedness of Kredin to the bank. It has not been satisfied to-date. Pursuant to cls. 2 and 15 of the charge, the respondent is deemed to have agreed to pay the bank the debt of Kredin upon demand being made. A demand was made

on 24 December 1985. Hence, monies became payable by the respondent to the bank. The bank filed foreclosure proceedings in relation to the land charged by the respondent which resulted in an order for sale being granted by the High Court on 17 September 1986 against the respondent. The respondent appealed to the Court of Appeal which set aside the order for sale solely on the ground that no proper or effective service of the demand was made by the bank on the respondent prior to the commencement of the foreclosure proceedings. In consequence, the bank served a fresh notice in Form 16D of the National Land Code 1965 on the respondent on 13 October 1998 demanding payment of the sum of US$57,790,482.20 representing Kredin's debt to the bank as of 30 April 1998. On 7 May 1999 Danaharta Urus Sdn Bhd ("the appellant") acquired from the bank the loan and charge by statutory vesting pursuant to the provisions of the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Act"). The vesting certificate was issued on 31 July 1999 and was lodged with the Registrar of Companies on 4 August 1999. By virtue of the Act the consequence of the issue of the vesting certificate was that the rights and remedies which originally vested in the bank under the loan agreement and the charge against the respondent now vested in the appellant with effect from 7 May 1999. Both prior to the vesting and at all material times thereafter the account had been a non-performing one, and neither the respondent nor Kredin had ever made any attempt to settle the debt to the bank or the appellant. On or about 1 April 2002 the respondent entered a private caveat against the title of the charged land. The appellant had, in a separate proceeding, applied to the High Court under s. 372 of the National Land Code 1965 for an order to remove the caveat and it is pending in the High Court.

On or about 23 January 2002 the respondent filed a civil suit against the bank and the appellant seeking various reliefs, including damages and an injunction against the appellant. The respondent sought an *ex parte* interlocutory injunction pending trial to restrain the Appellant from proceeding to sell the charged land by private treaty which was granted by the High Court on 28 January 2002. The injunction expired after 21 days. On 28 March 2002 the High Court dismissed the respondent's *inter partes* application for an injunction. The respondent appealed to the Court of Appeal. On 16 April 2002 the High Court declined to grant the respondent an Erinford injunction pending its appeal. On 29 April 2002 the Court of Appeal also declined to grant such an injunction.

When the appeal came up for hearing on 9 September 2002 the Court of Appeal noted that the respondent had not made any constitutional challenge to s. 72 of the Act ("s. 72") which bars the granting of injunctions by a court against the appellant. Section 72 reads as follows:

Notwithstanding any law, an order of a court cannot be granted:

a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act

and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

Accordingly, the Court of Appeal adjourned the hearing to enable the respondent to amend its statement of claim to plead this issue and also gave leave to the appellant to amend its statement of defence to answer the point. After the respondent had amended its statement of claim to contend that s. 72 of the Act is inconsistent with arts. 8(1) and 160(2) of the Federal Constitution ("art. 8(1)" and "art. 160(2)" respectively) the hearing resumed on 25 September 2002. In the course of submissions the Court of Appeal intimated that the Attorney-General ought to be invited to put forward his views on the constitutionality of s. 72. The hearing then resumed before the Court of Appeal on 21 November 2002 when the Attorney-General submitted that s. 72 is valid and constitutional. The Court of Appeal, in allowing the appeal with costs, granted the interlocutory injunction against the appellant and ordered the parties to attend before the Managing Judge of the Civil Division of the Kuala Lumpur High Court the next day to get trial dates for the civil suit. The Court of Appeal also dismissed the appellant's oral application for a stay of the injunction pending its application for leave to appeal to the Federal Court. On 10 November 2003 the Federal Court granted the appellant leave to appeal on two questions:

(i) Whether s. 72 contravenes art. 8(1); and

(ii) Whether the Court of Appeal was correct in law in granting the interlocutory injunction.

It was agreed before us that if it is found that s. 72 is not unconstitutional the second question need not be answered. We will therefore consider the constitutionality of s. 72 first.

In addressing this issue the Court of Appeal first considered whether access to justice is a guaranteed fundamental liberty. As Gopal Sri Ram JCA, in writing for the court, said at p. 15:

> In order to determine whether s. 72 runs foul of the Federal Constitution, it is necessary as a first step to ascertain whether access to justice is a guaranteed fundamental liberty. If the answer is in the affirmative then at the second stage we have to ascertain whether s. 72 denies such access.
>
> If access to justice is to be a fundamental liberty then it must be accommodated within art. 8(1) of the Federal Constitution. That article provides as follows:
>
> > All persons are equal before the law and entitled to the equal protection of the law.
>
> Now what does the word 'law' in art 8(1) mean? The answer, we have no doubt, is to be found in art. 160(2) of the Federal Constitution. That article defines 'law' as follows:
>
> > Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.
>
> For completeness it is necessary to reproduce the definition of 'written law':
>
> > Written Law' includes this Constitution and the Constitution of any State.
>
> For present purposes it is also necessary to set out the definition of 'Federal Law' under art. 160(2):
>
> > Federal Law' means:
> >
> > (a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and
> >
> > (b) any Act of Parliament.
> >
> > In the context of the instant appeal, the meaning of Federal Law under para (a) is not relevant.
> >
> > It is to be noted at once that the definition of 'law' in the Constitution is not exhaustive. It is open ended. Hence, it is not confined to written law. It therefore refers to a system of law that is fair and just. In our judgment, art 8(1) is a codification of Dicey's rule of law. Article 8(1) emphasizes that this is a country where Government is according to the rule of law. In other words, there must be fairness of State action of any sort, legislative,

executive or judicial. In simple terms, no one is above the law. This is exemplified by the fact that even hereditary Rulers have been made liable by the Constitution to be sued or prosecuted before the Special Court.

In support of his argument on art. 8(1) his Lordship referred to *Pierson v. Secretary of State for the Home Department* [1997] 3 All ER 577; *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64 and *S Kulasingham & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] 1 CLJ 65; [1982] CLJ (Rep) 314. His Lordship then said at p. 17:

> Since 'law' includes common law, an enacted law must satisfy the common law test of fairness if it is to pass muster under art 8(1). One of the fundamental principles of the common law is access to justice. That much is evident from the following two cases. In *R v. Secretary of State for the Home Department, ex parte Leech* [1993] All ER 539, Styen LJ stated:
>
> > Now we turn to a principle of greater importance. **It is a principle of our law that every citizen has a right of unimpeded access to a court.** In *Raymond v. Honey* [1982] I All ER 756 at p. 760, [1983] I AC I at p. 13 Lord Wilberforce described it as a 'basic right'. Even in our unwritten constitution it must rank as a constitutional right. (emphasis added.)'
>
> In *R v. Lord Chancellor, ex p Witham* [1997] 2 All ER 779, Laws J (as he then was) (said) at pp. 787-788:
>
> > It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right to access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right. But I must explain, as I have indicated I would, what in my view the law requires by such a permission. A statute may give the permission expressly; in that case it would provide in terms that in defined circumstances the citizen may not enter the court door. In *Ex p Leech* [1993] 4 All ER 539, [1994] QB 198 the Court of Appeal accepted, as in its view the ratio of their Lordships' decision in *Raymond v. Honey* [1982] 1 All ER 756, [1983] 1 AC I vouchsafed, that it could also be done by necessary implication. However, for my part, I find great difficulty in conceiving a form of words capable of making it plain beyond doubt to the statute's reader that the provision in question prevents him from going to court (for that is what would be required), save in a case where that is expressly stated. The class of cases where it could be done by necessary implication is, I venture to think, a class with no members.

> We pause to make one observation in regard to the foregoing passage. Since England has no written Constitution, Parliament is supreme in that country. Hence, Laws J's proposition that it is open to the English Parliament to restrict or deny access to justice is entirely correct in the context of the British Constitution. But it has no relevance to Malaysia because here it is not the law made by Parliament that is supreme: it is the Federal Constitution which is the supreme law (see art. 4(1)). There are of course serious attempts being made by English courts to bring the British Constitution as close as possible to a written constitution.

And at pp. 18-19:

> We would sum up our views on this part of the case as follows: (i) the expression 'law' in art. 8(1) refers to a system of law that incorporates the fundamental principles of natural justice of the common law: *Ong Ah Chuan v. Public Prosecutor*; (ii) the doctrine of the rule of law which forms part of the common law demands minimum standards of substantive and procedural fairness: *Pierson v. Secretary of State for the Home Department*; (iii) access to justice is part and parcel of the common law: *R v. Secretary of State for the Home Department, ex parte Leech*; (iv) the expression 'law' in art. 8(1), by definition (contained in art. 160(2)) includes the common law. Therefore, access to justice is an integral part of art. 8(1).

And at p. 22:

> We would add that the conclusion which we have arrived at, namely, that access to justice is an integral part of the constitutionally guaranteed fundamental liberty enshrined in art. 8(1) … .

What is clear from the passages reproduced from the judgment of the Court of Appeal is that access to justice is part and parcel of the common law; the expression "law" in art. 8(1) as defined in art. 160(2) includes the common law thereby making access to justice an integral part of art. 8(1); with the result that it is a constitutionally guaranteed fundamental liberty enshrined in art. 8(1). This suggests that the common law right of access to justice which was integrated into art. 8(1) is absolute. This suggestion requires to be addressed first in order to determine whether the right is in fact a guaranteed fundamental right.

The Court of Appeal correctly referred to the definition of "law" in art. 160(2). It reads as follows:

> Law includes written law, **the common law in so far as it is in operation in the Federation** or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof. (emphasis added)

It will become immediately apparent that this definition only authorises the reception of common law "... in so far as it is in operation in the Federation ..." The word "operation" means "in force". Therefore art. 160(2) refers to a law which has already brought into operation the common law in the Federation. That law is s. 3(1) of the Civil Law Act 1956 ("s. 3(1)"). It reads as follows:

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, subject however to subsection (3)(ii):
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

As Gopal Sri Ram JCA correctly pointed out in *Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee* [2002] 4 CLJ 776 at pp. 786-787:

> The approach of our courts to the development of our common law is to be found in the judgment of Hashim Yeop A Sani CJ (Malaya) delivered in the Supreme Court case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; ([1990] 1 CLJ (Rep) 57) where he said at p. 682 (p. 66):
>
> > Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country.

It is therefore abundantly clear that s. 3(1) permits the reception of the common law of England in the Federation subject to the very important qualification that it may be lawfully modified in the future by any written law.

The resultant matter for consideration is whether the common law that has been received through art. 160(2) is confined to the common law in operation at the date the Federal Constitution came into force or, like s. 3(1), as it is in operation from time to time pursuant to any modification made to it. In resolving this issue the primary observation to be made is that the common law referred to in art. 160(2) is the common law that was brought into operation in the Federation through s. 3(1). And s. 3(1) clearly envisages the modification of such common law in the future. Thus art. 160(2) must be construed against this background. This approach is supported by *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] 28 CLR 129 where Knox CJ, Isaacs, Rich and Starke JJ said at p. 152:

> The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then *lucet ipsa per se*.

If art. 160(2) is not interpreted together with s. 3(1) it would render the section otiose in so far as its power to modify the common law in the future is concerned. This will militate against one of the recognised canons of construction of a Constitution which is that if two constructions are possible the Court must adopt the one which will ensure the smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory (see *State of Punjab v. Ajaib Singh* AIR [1953] SC 10). In any event it must also be observed that the language employed in Article 160(2), that is to say, "… in so far as it is in operation in the Federation …", does not say in clear and precise words that it is a reference to the common law in operation at the date the Federal Constitution came into force. It must therefore be construed on the principle applicable where the incorporation of common law rights is involved. In this regard reference is made to *Amato v. The Queen* [1982] 140 DLR (3d) 405 where Estey J said at pp. 433-434:

> The conventional view has been that the common law is always speaking. Some theories hold that it is a process of discovery, others of evolution. Whatever it might be properly classified to be in jurisprudence it would take the clearest and most precise language in a statute which purports to incorporate the principles of common law to so construe it as to crystallize the common law at the date of enactment of the statute.

Article 160(2) must therefore be construed as referring to the common law which is in operation at the date of the Federal Constitution subject to it being modified at any time by any written law as provided by s. 3(1). To

that extent it is qualified and not absolute. The reference to common law in art. 160(2) is therefore a reference to common law in that sense and it is in that sense that the right must be incorporated into art. 8(1). As the continued integration of the common law right of access to justice into art. 8(1) is dependent on any contrary provision that may be made by any written law as provided by s. 3(1) it cannot amount to a guaranteed fundamental right. It is in the same position as in *S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314 where it was held that the legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees.

Be that as it may, and consistent with what has been stated thus far the very nature of the common law right of access to justice itself cannot render it absolute. It is meaningless on its own. There must be in existence rules and regulations to enable the right to be exercised which may vary from time to time. In this regard *Halsbury's Laws of England* 4th edn Reissue Vol 8(2) says at para. 141:

> The right of access to a court is not absolute: restrictions may be imposed since the right of access by its nature requires regulation, which may vary according to the needs and resources of the community and of individuals (see *Golder v. United Kingdom* A 18 [1975], 1 EHRR 524, E Ct HR, para 38).

The Court of Appeal may have been in a more advantageous position to appreciate this aspect of the right of access to justice if it had paused to consider its meaning in the light of other relevant provisions in the Federal Constitution, in particular, art. 121(1) ("art. 121(1)") which reads as follows:

> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) (Repealed),
>
> and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

However art. 8(1) was read in isolation with complete focus on the rights enshrined therein and with little regard for art. 121(1). In commenting on the relationship between the two provisions Gopal Sri Ram JCA said at p. 26:

> Thirdly, in so far as the power of Parliament to grant, limit or remove the jurisdiction of a High Court is concerned, we would draw attention to art 121 which provides, *inter alia*, that the High Court 'shall have such jurisdiction and powers as may be conferred by or under Federal law'. It is axiomatic that the 'Federal law' in that article refers to a valid Federal law. Take an extreme example. Let us say that a Federal law is enacted conferring advisory jurisdiction on the High Court. *Prima facie*, it is a Federal law that confers a particular jurisdiction.
>
> But, it is plain and obvious that such a law will be invalid because it would contravene art. 130 of the Federal Constitution. Indeed, it is on this very basis that an Act of Congress purporting to confer original jurisdiction on the Supreme Court of the United States was held unconstitutional in the leading case of *Marbury v. Madison* [1803] 1 Cranch 137. Thus, the Federal law to which art 121 refers may be held invalid on any constitutional ground available to a litigant. So, a bald statement to the effect that what statute gives, statute may take away is an oversimplification of the true constitutional position.

Having merely stated that the "federal law" in art. 121(1) refers to a valid federal law no further step was taken by the Court of Appeal to delve into its significance. Instead an extreme example was used to sideline what could otherwise have been programmed into a potent and powerful pointer towards the issues involved being properly patterned. It is sufficient to say that the power of the court to declare a law void should be exercised only with reference to the specific legislation which is impugned (see *State of MP v. GC Mandawar* [1955] SCR 599). This would exclude irrelevant and imaginary considerations. The simplistic approach of the Court of Appeal in dealing with the relationship between arts. 8(1) and 121(1) overlooks the principle of considering the Constitution as a whole in determining the true purport and import of a particular provision. A study of two or more provisions of a Constitution together in order to arrive at the true meaning of each one of them is an established rule of constitutional construction. In this regard it is pertinent to refer to *Bindra's Interpretation of Statutes* 7th edn which says at pp. 947-948:

> The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument (*Old Wayne etc Association v. McDonough* SI L ed 345; *Doconers v. Bidwell* 82 (US) 244:45 L ed 1088; *Myers v. United States* 272 US 52:71 L ed 60, 180). An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous (*Williams v. United States* 289 US 553:77 L ed 1372; *Marbury v. Madison I Cranch* (US) 137:2 L ed 60; *Myers v. United States* 272 US 52:71 L ed 60; *United States v. Buffer* 297 U SI: 80 L ed 477).

It follows that it would be improper to interpret one provision of the Constitution in isolation from others (see *S v. Ntesang* [1995] 4 BCLR 426). It is a recognised canon of construction that a Court should proceed on the assumption that no conflict or repugnancy between different parts of the Constitution was intended by its framers (see *Moinuddin v. State of UP* AIR 1960 All 484). In this regard Raja Azlan Shah FJ (as His Highness then was) said in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 at p. 190:

> This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself.

It was in that spirit that Suffian LP said in *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70 at p. 72:

> In our judgment, in construing Article 4(1) and Article 159, the rule of harmonious construction requires us to give effect to both provisions …

Thus if two provisions are in apparent conflict, a construction which will reconcile the conflict must be adopted.

Having highlighted the applicable principles it is now appropriate to consider the relationship between access to justice in art. 8(1) and the authority to make laws regulating the jurisdiction and powers of the High Court under art. 121(1). An understanding of this relationship will be enormously facilitated by a consideration of the meaning of the concept of access to justice. It is the right to have a dispute settled by a court of law. Thus the prerequisite to the exercise of this right is the existence of a court of law with jurisdiction and power to resolve the dispute. This nexus becomes

patently clear if it is realised, as stated by Lord Diplock in *Bremer Vulken Schiffbau und Maschinenfabrik v. South India Shipping Corp* [1981] 1 All ER 289 at p. 295, that:

> Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.

Access to justice would therefore be a meaningless right without the existence of a court with jurisdiction and power to enable the right to be exercised. Thus access to justice under art. 8(1) is a general right which can be fulfilled only by laws enacted conferring jurisdiction and powers on the courts under the specific authority contained in art. 121(1). While art. 8(1) deals with the right *per se* art. 121(1), on the other hand, confers power on Parliament to set up an institutionalised mechanism with power and jurisdiction to determine the extent and manner in which that right should be exercised. Articles 8(1) and 121(1) are therefore not in conflict but complement each other. The jurisdiction and power of the courts as provided by law is clearly the dominant element which determines the boundaries of access to justice. Article 8(1) cannot therefore be read in isolation. As both the provisions of the Constitution bear upon the same subject they must be read together and be so interpreted as to effectuate the great purpose of the instrument, that is to say, the Federal Constitution. The rule of harmonious construction therefore demands that both the provisions be so construed as to give meaning and effect to them with the result that access to justice shall be available only to the extent that the courts are empowered to administer justice. The corollary is that the manner and extent of the exercise of the right of access to justice is subject to and circumscribed by the jurisdiction and powers of the court as provided by federal law. As a matter of fact whenever a law is passed either enlarging or curtailing the jurisdiction and powers of the courts it has a direct bearing on the right of access to justice. The right is determined by the justiciability of a matter. If a matter is not justiciable there is no right of access to justice in respect of that matter. Thus Parliament can enact a federal law pursuant to the authority conferred by art. 121(1) to remove or restrict the jurisdiction and power of the court. In this regard Viscount Dilhorne correctly pointed out in his dissenting judgment in *Hinds v. The Queen* [1976] 1 All ER 353 at 378:

> We agree that the constitutions on the Westminster model were evolutionary and not revolutionary but it does not follow from that that the Parliament of a territory cannot by ordinary enactment alter the jurisdiction and powers of any court named in the Constitution.

Section 72 is a federal law that deals with the jurisdiction of the court with regard to the grant of injunctions. It is a law made by Parliament under the authority and scope of art. 121(1). As it deals with the jurisdiction of the court it is a "written law" within the meaning of s. 3(1) in so far as the common law right of access to justice contained therein is concerned. It is one that modifies the common law right of access to justice as permitted by s. 3(1). The modified right of access to justice will then be the common law in operation for the purpose of art. 160(2). It is this modified right of access to justice that will now become an integral part of art. 8(1). This is because art. 8(1) encapsulates the common law which has been prescribed or which has been modified by a written law and received through art. 160(2) read with s. 3(1). There will be no impediment to the accommodation of this change by art. 8(1) because, as explained earlier, the right of access to justice that was originally integrated into art. 8(1) is one which can be modified and is therefore not absolute. The right that had become integrated into art. 8(1) earlier must therefore now yield to the change that has been made.

However, s. 72, being a law passed under art. 121(1) after Merdeka Day, must not be inconsistent with the Federal Constitution. This is stipulated in art. 4(1) of the Federal Constitution which provides that "... any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void." This in fact means that the provisions of the Federal Constitution are not mutually exclusive with the result that where a law falls under more than one provision it must pass the test of all the provisions concerned in order to be declared as valid (see *RC Cooper v. Union of India* AIR [1970] SC 564; *Maneka Gandhi v. Union of India & Anor* AIR [1978] SC 597). As a law that deals with the jurisdiction and power of the court, though passed under art. 121(1), has a direct effect on the right of access to justice it will also come within the ambit of art. 8(1). Section 72, being such a law, must therefore satisfy the requirements of art. 8(1) so as not to be impugned. What must therefore be determined now is whether s. 72, which prohibits a court from granting an injunction and thereby amounting to a restriction on the right of access to justice, violates art. 8(1) which reads as follows:

> All persons are equal before the law and entitled to the equal protection of the law.

Gopal Sri Ram JCA in concluding that s. 72 is unconstitutional referred to *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 and said at pp. 21-22:

> In a later passage, the learned Lord President when discussing the judgment of Dr Anand J (later Chief Justice of India) in *Mian Bashir Ahmad & Ors v. The State* AIR 1982 J & K 26, said:
>
> > The main judgment which constituted the minority opinion was delivered by Dr Anand. The most pertinent point of his Lordship's judgment on the correct approach to adopt in determining whether the impugned legislation violates the fundamental right guaranteed under art. 19(1)(c) of the Constitution was that (at p. 59 para 101):
> >
> > > the legislation can be, of course, struck down if it directly infringes the fundamental rights of a legislator but it can also be struck down if the inevitable consequences of the legislation is to prevent the exercise of the fundamental rights guaranteed under art 19(1)(c) or to make the exercise of that right 'ineffective or illusory'. (emphasis added.)
> >
> > In so holding, his Lordship relied upon the judgment of the Supreme Court of India in *Smt Maneka Ghandi v. Union of India* AIR 1978 SC 597 at pp 632-633 where the entire case law on the point was considered, and where their Lordships explained, that the word "direct" would go to the quality or character of the effect and not the subject matter; and, on the other hand, they pointed out:
> >
> > > that the test of 'inevitable' consequence 'helps to quantify the extent of direction necessary to constitute' infringement of a fundamental right. Now, if the effect of state action on a fundamental right is direct and inevitable, then a *fortiori* it must be presumed to have been affected ... this is the text which must be applied for the purpose of determining whether the impugned order made under it is violative of art 19(1)(a) or (c).'
> >
> > Explaining the expression 'direct and inevitable effect' as used by their Lordships in *Smt Maneka Ghandi*'s case, Dr Anand said (at p. 59 para 102 col 2) that the impugned action would be struck down if either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.
>
> He then proceeded to conclude as follows:

> Since the inevitable effect of s. 24G(a) is that it makes the exercise of right of association guaranteed under art. 19(1)(c) ineffective and illusory in so far as legislators are concerned, it must be held to be unconstitutional.
>
> *We share Dr Anand's view taken from the Supreme Court decision in Smt Maneka Gandhi's case, that in testing the validity of state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequences on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.* (emphasis added.)

It is to be noted that the unanimous view of the Supreme Court as reflected in the above-quoted passage in the judgment of the learned Lord President to which we have lent emphasis was echoed by Gunn Chit Tuan SCJ in his judgment of the report. His Lordship there said as follows:

> I would again agree with Bhagwati J in *Maneka Gandhi v. The Union of India* that 'the test which must be applied is whether the right claimed is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right'. Applying that test, I am of the view that the right claimed by the respondents in this case, ie the right to leave one political party and to join another is an integral part of the fundamental right of association or at least partakes of the same basic nature …

We would add that the conclusion which we have arrived at, namely, that access to justice is an integral part of the constitutionally guaranteed fundamental liberty enshrined in art. 8(1) is based on the principles of construction stated by Raja Azlan Shah Ag LP in Dato Menteri Othman Baginda and by the test laid down by the Supreme Court in *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor.*

What is the net effect of s. 72?

Section 72 by its terms prohibits a court from, inter alia, granting an injunction against the second defendant. But it does not prevent the issuing of an injunction in the second defendant's favour. The section therefore seeks to immunise the second defendant which is a private limited company from being restrained in any manner whatsoever, however illegal its acts may be. In other words, the second defendant enjoys blanket immunity from injunctive relief.

> In our judgment, adopting the principle stated by Lord Steyn in *Pierson v. Secretary of State for the Home Department*, s. 72 is contrary to the rule of law housed within art. 8(1) of the Federal Constitution in that it fails to meet the minimum standards of fairness both substantive and procedural by denying to an adversely affected litigant the right to obtain injunctive relief against the second defendant under any circumstances, including circumstances in which the Act may not apply.

And at p. 27:

> To conclude, it is our considered judgment that s. 72 fails to meet the minimum standards of fairness as encapsulated in art. 8(1) because it denies the appellant an opportunity to protect his immovable property by means of a temporary injunction under any circumstances whilst not placing any fetter upon the power to grant the same relief in the respondent's favour.

The passages just referred to read with the earlier parts of the judgment reproduced previously reveals that the Court of Appeal had conducted a rigid scrutiny of s. 72 and had immediately proceeded to rule it as being unconstitutional since it is contrary to the rule of law housed within art. 8(1) in that is fails to meet the minimum standards of fairness. But that is not our law. In order to appreciate our law it must first be understood that equality does not mean absolute equality of all men, which is a physical impossibility to attain (see *Sheoshanker v. State of MP* AIR 1951 Nag 58). In saying that equality is a legal concept which is easy to state but difficult to apply Suffian LP said in *Datuk Haji Harun bin Hj Idris v. Public Prosecutor* [1977] 2 MLJ 155 at p. 165:

> … because, first, equality can only apply among equals and in real life there is little equality, and, secondly, while the concept of equality is a fine and noble one it cannot be applied wholesale without regard to the realities of life. While idealists and democrats agree that there should not be one law for the rich and another for the poor nor one for the powerful and another for the weak and that on the contrary the law should be the same for everybody, in practice that is only a theory, for in real life it is generally accepted that the law should protect the poor against the rich and the weak against the strong.

Article 8(1) is therefore not intended to make unequals equal. As Chaudhari & Chaturvedi say in their book *Law of Fundamenal Rights* 4th edn at p. 15:

> Equality presupposes classes. Therefore, the only application of the equality clause in a society of classes is by creating, abolishing, reconstituting, recognising or providing for any facility for any class, at any suitable time.

It follows that the requirement for equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force (see *Malaysian Bar & Anor v. Government of Malaysia* [1987] 2 MLJ 165). In *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ Lord Diplock said at p. 72:

> Equality before the law and equal protection of the law require that like should be compared with like. What art. 12(1) (our Article 8(1)) assures to the individual is the right to equal treatment with other individuals in similar circumstances.

Similarly as Hashim Yeop A Sani J (as he then was) said in *Public Prosecutor v. Su Liang Yu* [1976] 2 MLJ 128 at p. 129:

> The dominant idea in both expressions 'equal before the law' and 'equal protection of the law' is that of equal justice. The meaning of these two expressions have been decided in a number of decisions of the US Supreme Court and also the Indian Supreme Courts and certain principles have been settled and accepted. Due to the demands caused by the complexity of modern government the doctrine of classification was evolved by the courts for practical purposes and read into the equality provision. It has been accepted therefore that a legislature for the purpose of dealing with the complex problems arising out of an infinite variety of human relations cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate.

It is also useful to refer to *Public Prosecutor v. Khong Teng Khen & Anor* [1976] 2 MLJ 166 where Suffian LP said at p. 170:

> The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons … for the purpose of legislation', *Kedar Nath v. State of West Bengal* AIR 1953 SC 404, 406. In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher

> or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate Article 8. All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.

Thus what art. 8(1) means is that there must be a subjection to equal laws applying alike to all persons in the same situation (see *Vide Southern Railway Co v. Greene* 216 US 400). The validity of a law relating to equals can therefore only be properly tested if it applies alike to all persons in the same group. This can only be ascertained by the application of the doctrine of classification. In support reference is made to *Constitutional Law of India* by Seervai 4th edn, vol I, p. 439:

> 'What is meant by the "equal protection of the law"?' We must answer that question. If all men were created equal, and remained equal throughout their lives, then the same laws would apply to all men. But we know that men are unequal; consequently, a right conferred on persons that they shall not be denied 'the equal protection of the laws' cannot mean the protection of the same laws for all. It is here that the doctrine of classification … steps in, and gives content and significance to the guarantee of the equal protection of the laws. … A law based on a permissible classification fulfils the guarantee of the equal protection of the laws and is valid; a law based on an impermissible classification violates that guarantee and is void.

The corollary is that the doctrine of reasonable classification is the only method of determining whether a law applies alike to all persons who are similarly circumstanced. It is therefore an integral part of art. 8(1).

The manner of ascertaining whether a classification is reasonable is succinctly explained by Suffian LP in the celebrated case of *Datuk Haji Harun bin Hj Idris v. Public Prosecutor* [1977] 2 MLJ 155 at pp. 165-166:

> In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.
>
> With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia & Ors v. Shri Justice S R Tendolkar & Ors* AIR [1958] SC 538, provided that:

(i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

Where therefore the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law there will be no violation of art. 8(1) (see *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64). Thus if a law deals equally with all persons of a certain well-defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and, therefore, there is no discrimination amongst equals (see *Charanjit Lal v. Union of India* AIR [1951] SC 41). A law would be regarded as discriminatory only if it discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter (see *State of WB v. Anwar Ali* AIR [1952] SC 75). As stated in *Lindsley v. National Carbonic Gas Co* [1911] 220 US 61 it is only when a law is without any reasonable basis can it be termed as arbitrary. It must be noted that there is always a presumption that Parliament understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds (see *Ram Prasad v. State of Bihar* AIR [1953] SC 215). A court cannot, in the nature of things, be a better judge than Parliament itself in a matter of this kind (see *Asiatic Engineering Co v. Achhru Ram* AIR [1951] All 746). Equal protection violations are always examined with the presumption that the State action is reasonable and just, and unless it can be shown that the discrimination that has been resorted to or the power to discriminate that has been given is without reason, it cannot be said that there is unequal treatment (see *Sagir Ahmad v. Government of UP* AIR [1954] All 257).

It is thus manifestly patent that a law can be struck down as being discriminatory, arbitrary or unfair only if it is not based on a reasonable or permissible classification. The Court of Appeal has therefore misdirected itself in not evaluating s. 72 in the manner as explained hereinbefore. Instead of having summarily dismissed s. 72 the Court of Appeal, having found that it immunises the appellant from injunctive relief, ought to have proceeded to ascertain whether it is based on a classification followed by whether there is a reasonable basis for the classification having regard to its object. The exercise must be premised on a presumption that s. 72 is constitutional. Indeed the need for such an exercise has been our law all along and was reiterated in the judgment of this court in *Abdul Ghani bin Ali @ Ahmad & Others v. Public Prosecutor* [2001] 3 MLJ 561 which relied on the reasonable classification test as enunciated in *Datuk Hj Harun bin Hj Idris v. Public Prosecutor* [1977] 2 MLJ 155. The Court of Appeal ought to have felt itself bound by this line of authorities. Perhaps it was not aware of the recent and clear reminder of the law by the highest court in the land.

We pause for a moment to consider the submission of learned counsel for the respondent that the applicable test to determine the validity of a legislation in order to ascertain whether it offends art. 8(1) is the one adopted in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 and *Mohd Ezam v. Ketua Polis Negara* [2002] 4 CLJ 309. As learned counsel for the respondent said:

> The Court of Appeal was correct in applying the Nordin Salleh test and approach, and looking at the arbitrariness involved in denying equal access to the Courts.

That test, following the Indian cases of *E P Royappa v. State of Tamil Nadu & Anor* AIR [1974] SC 555 and *Maneka Gandhi v. Union of India & Anor* AIR [1978] SC 597, stipulates that an impugned action would be struck down if either it directly affects a fundamental right or its inevitable effect on the fundamental right is such that it makes its exercise ineffective or illusory. What must not be overlooked is that the test was considered in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 against the background of art. 10 of the Federal Constitution and in *Mohd Ezam v. Ketua Polis Negara* [2002] 4 CLJ 309 against the background of art. 5(1) of the Federal Constitution. To extend the test to art. 8(1) would render that article otiose. It would amount to testing the validity of a law on the face of it as it appears with complete disregard of what is otherwise an integral part of art. 8(1), that is to say, the process of reasonable classification. That would be in direct conflict with the foundation and philosophy underlying art. 8(1). The test

is therefore wholly incompatible with art. 8(1). Even in *Mian Bashir Ahmad & Ors v. The State* AIR [1982] J & K 26, adopted in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72, Dr Anand J in following *Maneka Gandhi v. Union of India & Anor* AIR [1978] SC 597 considered the validity of the impugned legislation under art. 14 (our art. 8(1)) as a separate exercise by the use of the reasonable classification test. This is obviously because *Maneka Gandhi v. Union of India & Anor* AIR [1978] SC 597 itself dealt only with art. 19 of the Indian Constitution (our art. 10) and did not extend the test to art. 14 (our art. 8(1)) which was dealt with separately. What Bhagwati J did in that case was to reformulate the reasonable classification test in the following words at p. 625:

> Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *E P Royappa v. State of Tamil Nadu* [1974] 2 SCR 348: (AIR 1974 SC 555) namely, that 'from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14'. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

It is of interest to note that there was a subsequent change in the reformulated test. In *Ajay Hasia v. Khalid Mujid Sehravardi & Others* AIR [1981] SC 487 Bhagwati J referred to the test that he had formulated and added at p. 499:

> This was again reiterated by this Court in *International Airport Authority*'s case ([1979] 3 SCR 1014) at p. 1042: (AIR [1979] SC 1628) *(supra)* of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the Courts is not a paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Art 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.

There would appear to be a retreat by Bhagwati J in his view of the reasonable classification test as he had accepted it in a different form. He said that it is not a paraphrase of art. 14 nor is it the objective and end of that article but is merely a "judicial formula" for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. The basis of the test being a mere "judicial formula" is difficult to fathom. It overlooks the relationship between the reasonable classification test and art. 8(1) as discussed earlier. That relationship goes beyond being a mere "judicial formula" and into the very heart of art. 8(1) itself. It is therefore not surprising that in *RK Garg v. Union of India* AIR [1981] SC 2138 Bhagwati J, in saying that art. 14 (our art. 8(1)) does not forbid reasonable classification for the purpose of attaining specific ends, having been confronted with *Re: Special Courts Bill* AIR [1979] SC 478, said at pp. 2146-2147:

> That takes us to the principal question arising in the writ petitions namely, whether the provisions of the Act are violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been the subject matter of discussion in numerous decisions of this Court and the propositions applicable to cases arising under that Article have been repeated so many times during the last 30 years that they now sound platitudinous. The latest and most complete exposition of the propositions relating to the applicability of Article 14 as emerging from 'the avalanche of cases which have flooded this Court' since the commencement of the Constitution is to be found in the judgment of one of us (Chandrachud, J as he then was) in *Re: Special Courts Bill* [1979] 2 SCR 476: AIR [1979] SC 478. It not only contains a lucid statement of the propositions arising

under Article 14, but being a decision given by a Bench of seven Judges of this Court, it is binding upon us. That decision sets out several propositions delineating the true scope and ambit of Article 14 but not all of them are relevant for our purpose and hence we shall refer only to those which have a direct bearing on the issue before us. They clearly recognise that classification can be made for the purpose of legislation but lay down that:

1. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

2. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

It is clear that Art 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be 'arbitrary, artificial or evasive' but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. The question to which we must therefore address ourselves is whether the classification made by the Act in the present case satisfies the aforesaid test or it is arbitrary and irrational and hence violative of the equal protection clause in Article 14.

Gupta J who expressed a minority view in that case referred to the various stands taken by Bhagwati J and said at p. 2161:

Bhagwati J reiterates in *Maneka Gandhi v. Union of India* [1978] 2 SCR 621: AIR [1978] SC 597 what he had said in *Royappa*'s case and adds (at 624):

> The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence ... .

> To pass the test of reasonableness if it was enough that there should be a differentia which should have some connection with the object of the Act, then these observations made in Maneka Gandhi and Royappa would be so much of wasted eloquence.

It is therefore not surprising that subsequently the reasonable classification test that we know of has been consistently followed in India in cases such as *Debranjan Ray v. Comptroller and Accountant-General of India* AIR [1985] SC 307; *Deepak Sibal v. Punjab University* AIR [1989] SC 903; *Federation of Hotel and Restaurant v. Union of India* AIR [1990] SC 1637; *John Vallamattom & Anor v. Union of India* [2003] 3 LRI 169 and *Saurabh Chaudri & Others v. Union of India* (2003) 4 LRI 532. Thus it is clear that in India the reasonable classification test has been reasserted as it originally was. It follows that the submission of learned counsel for the respondent that the test adopted in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 also applies to art. 8(1) cannot be sustained.

It may be relevant to identify some of the salient rules governing the application of the reasonable classification test. A law which comes up for consideration on the question of its validity under art. 8(1) may be placed in one of several categories. In *Shri Ram Krishna Dalmia & Others v. Shri Justice S R Tendolkar & Others* AIR [1958] SC 538 SR Das CJ identified five such categories. They are:

1. A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law, as it did in *Chiranjitlal v. Union of India* AIR [1951] SC 41, *State of Bombay v. FN Balsra* AIR [1951] SC 318, *Kedar Nath Bajoria v. State of West Bengal* AIR [1953] SC 404, *VM Syed Mohammad & Company v. State of Andhra* AIR [1954] SC 314 and *Budhan Choudhry v. State of Bihar* AIR [1955] SC 191.

2. A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnissa Begum v. Mahboob Begum* AIR [1953] SC 91 and *Ramprasad Narain Sahi v. State of Bihar* AIR [1963] SC 215.

3. A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal v. Anwar Ali Sarkar* AIR [1952] SC 75, *Dwarka Prasad v. State of Uttar Pradesh* AIR [1954] SC 224 and *Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs* [1955] AIR [1954] SC 424.

4. A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification; the court will uphold the law as constitutional, as in *Kathi Raning Rawat v. The State of Saurashtra* AIR [1952] SC 123.

5. A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held in *Kathi Raning Rawat v. The State of Saurashtra* AIR [1952] SC 123 that in such a case the executive action but not the statute should be condemned as unconstitutional.

SR Das CJ also listed some guidelines that must be borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws. They are:

1. A law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself.

2. There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

3. It must be presumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

4. The legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

5. In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

6. While good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of

always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

In elaborating on the sources that the court may resort to in obtaining the necessary information Ayyangar J said in *Jyoti Pershad & Others v. Administrator for the Union Territory of Delhi & Others* AIR [1961] SC 1602 at pp. 1609-1610:

> Such guidance may thus be obtained from or afforded by (a) the preamble read in the light of the surrounding circumstances which necessitated the legislation, taken in conjunction with well-known facts of which the Court might take judicial notice or of which it is appraised by evidence before it in the affidavits [1952] SCR 435: AIR [1952] SC 123, being an instance where the guidance was gathered in the manner above indicated, (b) or even from the policy and purpose of the enactment which may be gathered from other operative provisions applicable to analogous or comparable situations or generally from the objects sought to be achieved by the enactment.

Bhagwati J, in emphasising that a law dealing with economic activity should be viewed with greater latitude, said in *RK Garg v. Union of India* AIR [1981] SC 2138 at p. 2147:

> Another rule of equal importance is that law relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes J, that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.

It is against the background of the law just highlighted that Dato' Mary Lim, the learned senior federal counsel who represented the intervener, submitted to the Court of Appeal that the Act is a special law specifically enacted to meet an economic exigency. She said that it was passed in the public interest and for the public good. She urged the court to take judicial notice of the financial crisis that the world underwent in the dying years of the last century. She also invited the court to have regard to the preamble to the Act which uses the phrase "public good". It was also submitted that

the Act is of a temporary nature and that this was an important consideration to bear in mind when determining constitutionality. Based on these matters, she argued that s. 72 should be upheld and not struck down as unconstitutional. In making the submission she was perhaps inspired by the sagacious words of Ramly Ali J who, in dealing with the Act, said in *Franky Construction Sdn Bhd v. MEC Industrial Park Sdn Bhd* [2002] 6 MLJ 212 at p. 221:

> It is also stated in the preamble of the Act that the legislation is the only means by which the acquisition, management, financing and disposition of assets and liabilities can be implemented promptly, efficiently and economically for the public good; and that legislation is the only means by which special administrators may be appointed expeditiously to administer and manage persons whose assets and liabilities have been so acquired by Danaharta. Therefore, it is not surprising that the Danaharta Act contain special provisions with special powers to enable Danaharta and the special administrators to achieve the purpose of the Act, particularly at times when the country is facing economic and financial turbulence. We are still in the process of recovering and Danaharta and the special administrators still have a long way to complete their missions as entrusted by the Danaharta Act. Therefore it is necessary for everybody, including the court, to interpret the provisions of the Danaharta Act along the missions which the Act wishes to achieve. That is the intention of the legislature in making the said Danaharta Act and that is the background that the Act should be given due recognition.

However, the submission made was rejected by the Court of Appeal almost the moment it was stated. As Gopal Sri Ram JCA said at pp. 23-24:

> With respect, we are unable to agree with these arguments. Firstly, all Acts of Parliament are passed in the public interest and for the public good. It is therefore a hollow suggestion that a particular Act be upheld as being constitutional based on this consideration purely because that purpose appears in the preamble. Further, it is well settled that when the constitutionality of a statutory provision is called into question the courts as the judicial arm of the Government of the Federation are not concerned with the propriety or expediency of the impugned law. In short, Parliamentary motive is irrelevant to the issue of constitutionality. Here we would quote the following passage in the judgment of Lord Diplock in *Hinds v. The Queen* which was applied by Raja Azlan Shah FJ in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187:
>
> > So in deciding whether any provisions of a law passed by the Parliament or Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those

> provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision.

Secondly, it is settled law that a preamble may not be used as an aid to interpret a provision in a statute which is clear and unambiguous. As observed by Abdoolcader J (as he then was) in *Re Tan Boon Liat* [1976] 2 MLJ 83, at p. 85:

> Although the preamble is a part of a statute, it is not an operating part thereof. The aid of the preamble can be taken only when there is some doubt about the meaning of the operative part of the statute. The preamble undoubtedly throws light on the intent and design of the enacting authority and indicates the scope and purpose of the legislation itself but it should not be read as a part of a particular section of that written law. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and where they do so, they cannot be cut down by reference to it. It is accordingly clearly settled law that the preamble cannot restrict the enacting part of a statute though it may be referred to for the purpose of solving an ambiguity.

In our view the reasons advanced and the authorities relied on by the Court of Appeal are out of context with the submission made. The submission was correctly made in order to facilitate a determination of the object of the Act which is a necessary element of the reasonable classification test. In fact, as observed by Hashim Yeop A Sani J (as he then was) in this regard in *Public Prosecutor v. Su Liang Yu* [1976] 2 MLJ 128, the "… first duty of the court which is really a rule of common sense is to examine the purpose and policy of the statute …" It was for this purpose that the Court of Appeal was invited to consider the preamble to the Act. This invitation was declined on the ground that a preamble may not be used as an aid to interpret a provision in a statute which is clear and unambiguous. It must be emphasised that there can be no dispute with that proposition as the language of s. 72 is indeed clear and unambiguous. But the Court of Appeal was not invited to interpret s. 72; the invitation was to rule on its constitutionality for which purpose its object is relevant. The submission advanced was therefore dismissed on grounds which cannot be justified.

It is now apposite to consider whether s. 72 meets the requirements of the reasonable classification test. What needs to be looked at for this purpose is the object of the Act and the role of s. 72 in attaining that object which have been eloquently set out in the written submission of the appellant. The July 1997 financial and economic crisis which hit Malaysia along with a few other Asian countries were of such severity that countries like Indonesia, South Korea and Thailand sought financial assistance from the International Monetary Fund to salvage their economies. The Malaysian Ringgit, which was trading at RM2.50 to US$1 for long periods prior to July 1997, was particularly affected; falling to RM4.88 to US$1 in January 1998. Share prices of most counters in the Kuala Lumpur Stock Exchange plummeted. Wealth destruction was unprecedented in the nation's history. Non-performing loans due and owing to banks reached a staggering level. It was against this background that the Act was passed by Parliament in July 1998. The object of Parliament in enacting this law has been clearly stated in the Preamble to the Act. It reads as follows:

> An Act to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by the Corporation, the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by the Corporation and for matters connected therewith or incidental thereto.
>
> 1. WHEREAS special administrators are required in the public interest to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises and to promote the revitalization of the nation's economy by injecting liquidity into the financial system, such goals to be achieved through the acquisition, management, financing and disposition of assets and liabilities:
>
> 2. AND WHEREAS legislation is the only means by which the acquisition, management, financing and disposition of assets and liabilities can be implemented promptly, efficiently and economically for the public good:
>
> 3. AND WHEREAS legislation is the only means by which special administrators may be appointed expeditiously to administer and manage persons whose assets or liabilities have been so acquired:
>
> 4. AND WHEREAS Pengurusan Danaharta Nasional Berhad has been established as a corporation incorporated under the Companies Act, 1965 for such purposes.

The object of the Act was explained in clearer terms in the speech delivered by the then Minister of Finance in Parliament while introducing the Bill to the Act. The material parts of it read as follows:

a … suatu akta untuk memberi kuasa kepada Pengurusan Danaharta Nasional Berhad untuk mengambil alih pinjaman-pinjaman tidak berbayar dari institusi kewangan dan menggunakan prosedur pintas bagi memindah serta mendapatkan hak milik ke atas aset atau sekuriti yang disandarkan ke atas pinjaman dengan ketentuan pemilikan, seterusnya menguruskan pinjaman dan aset serta melaksanakan rancangan menyusun semula aset-aset b dibacakan kali kedua sekarang. … … …

Dengan itu kerajaan telah memutuskan untuk menubuhkan sebuah syarikat yang dikenali sebagai Pengurusan Danaharta Nasional Berhad atau pun Danaharta dengan tujuan khusus untuk mengambil alih pinjaman tidak berbayar daripada institusi kewangan di Malaysia dan seterusnya c menguruskan NPL serta aset-aset yang terbabit. Ini akan membolehkan institusi kewangan menumpukan perhatian dan usaha kepada aktiviti perbankan komersial yang biasa tanpa perlu memberi lebih tumpuan untuk mendapatkan kembali pembayaran ke atas hutang-hutang tersebut.

Danaharta akan membeli pelbagai jenis pinjaman, mendapat hak milik yang d sempurna ke atas aset yang berkaitan dengan NPL dan memindahkan hak milik yang sempurna kepada pihak ketiga. Dengan menjual aset kepada Danaharta, bank dapat menggantikan NPL dengan wang tunai. Rundingan tentang harga jualan akan dijalankan secara komersial dan kedua-dua belah pihak, penjual dan pembeli, berurus niaga di atas kerelaan masing-masing. e …

Untuk berjaya mencapai objektifnya Danaharta perlu berupaya mengurus dan menyelesaikan pengambilan alih aset dan liabiliti dengan cepat dan berkesan. Dengan itu syarikat ini tidak boleh beroperasi seperti syarikat biasa dan dikongkong oleh peraturan dan perundangan transaksi perniagaan. Untuk tujuan ini, Danaharta akan ditubuhkan sebagai sebuah f syarikat berkanun yang diperbadankan di bawah Akta Syarikat 1965 dengan kuasa-kuasa yang akan diberikan oleh sebuah akta Parlimen. Status sebagai sebuah syarikat berkanun akan memberi Danaharta kelenturan dari segi perolehan sumber kewangan dan operasi di samping memberi kuasa undang-undang yang khusus bagi memenuhi objektifnya.

g Danaharta menjangkakan operasi untuk mengambil alih NPL melalui peruntukan akta sedia ada dan prosedur biasa akan melewatkan proses pengambilan alih NPL dan aset yang berkaitan dengannya. Oleh yang demikian, bagi membolehkan Danaharta bergerak dengan cekap, cepat dan berkesan, ianya perlu mempunyai kuasa-kuasa tertentu di bawah sebuah h akta Parlimen seperti berikut:

(i) keupayaan mengambil alih pinjaman daripada institusi kewangan dengan menggunakan prosedur pintas bagi memindah dan mendapatkan hak milik ke atas aset atau sekuriti yang disandarkan dengan ketentuan pemilikan; dan

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(ii) keupayaan untuk menguruskan pinjaman dan aset serta melaksanakan rancangan semula aset-aset.

Justeru itu adalah difikir wajar kerajaan menggubal sebuah rang undang-undang dengan memberi kuasa-kuasa tertentu kepada Danaharta untuk melaksanakan tugas dan tanggungjawabnya. …

Rasional peruntukan ini ialah untuk membolehkan Danaharta mengambil alih dan jika perlu melupuskan aset dengan cepat, cekap dan berhemat. Danaharta perlu mempunyai keupayaan untuk mendapat dan memindahkan hak milik mutlak ke atas aset tersebut kepada mereka. Kegagalan berbuat demikian terutamanya apabila ia melibatkan aset-aset bermasalah akan mendedahkan Danaharta dan pihak yang membeli aset itu daripada Danaharta kepada risiko kewangan yang tidak teranggar dan proses perundangan yang berlarutan. Namun demikian, hak pemilik aset tetap terpelihara tetapi ia mesti dizahirkan semasa transaksi penjualan dibuat oleh Danaharta. Jika ia tidak dizahirkan, pemilik aset masih boleh membuat tuntutan daripada penjual aset. … … …

Penggubalan Rang Undang-Undang Pengurusan Danaharta bertujuan memastikan supaya usaha Danaharta untuk memulihkan ekonomi negara melalui pemindahan NPL dan aset bermasalah dari sector perbankan kepada sebuah entiti yang mampu menguruskan NPL dan aset tersebut secara profesional, telus dan berkesan. Justeru itu, institusi perbankan dapat menumpukan semula usaha mereka kepada aktiviti yang asal dan dengan itu akan menggalakkan keyakinan yang berterusan terhadap sistem kewangan negara.

Parliament's clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximise recovery values. The appellant was thus given three principal duties. They are:

(a) acquisition of non-performing loans and assets;

(b) management of such assets, including by way of the appointment of Special Administrators to temporarily manage the affairs of corporate borrowers in place of their directors; and

(c) disposition of the acquired assets.

In order to accomplish these objectives the appellant was given sufficiently wide and broad statutory powers to acquire loans and credit facilities by way of statutory vesting; to manage the affairs of corporate borrowers through Special Administrators appointed to formulate Work-out Plans in order to repay debts owing to creditors, and finally to dispose of charged assets. Thus insofar as disposition of assets was concerned the appellant was given additional power to sell charged lands by private treaty, without securing the usual court order as banks and other secured lenders are obliged to do so under the National Land Code 1965. Quite clearly sales of these properties would be substantially delayed if injunctive relief was available. It must also be observed that in order to enable the appellant to expeditiously and promptly dispose off properties at the best recovery value in line with Parliament's intention it is important for it to be in a position to give good title to the properties fast so that purchasers can readily get themselves registered as proprietors after they have paid the full purchase price to the appellant. If purchasers cannot be registered quickly as proprietors because the appellant is restrained by injunction from completing sales it would have a crippling effect on its ability to dispose off the acquired properties. Furthermore, Special Administrators are obliged to formulate Work-out Proposals which have to deal with disposition of assets of corporate borrowers and the proposed settlement of debts to creditors. If injunctions can be granted to restrain the implementation of any Work-out Proposals, substantial prejudice would result, particularly to creditors of these corporate borrowers (known as "affected persons" under the Act). Accordingly, it is of critical importance for the appellant to be allowed to carry out its duties without the delaying effect of any injunctive relief. Thus the Act was amended in September 2000 to introduce s. 72 to enable the appellant to carry out its operations more speedily so as to achieve its objectives without being inundated, saddled or slowed down by applications for injunctions, with its inherent delay. As stated by the then Deputy Minister of Finance in introducing the Bill to the amendment to the Act in Parliament:

> Pindaan yang dicadangkan adalah bertujuan untuk membolehkan Danaharta untuk terus beroperasi secara efisien di dalam mencapai objektif penubuhannya. Di samping itu, ianya akan membenarkan Danaharta melaksanakan pemerolehan, pengurusan dan pelupusan aset secara tepat, cekap dan berhemat. Pindaan Akta Danaharta juga adalah perlu untuk menjelaskan dengan lebih lanjut beberapa peruntukan Akta itu dan juga untuk menyelesaikan masalah-masalah praktikal berkenaan dengan Akta Danaharta yang telah dihadapai sepanjang tahun pertama Danaharta beroperasi. … Seksyen 72 yang baru menghalang injunksi mandatori dan

> prohibitori dikeluarkan terhadap Danaharta, Jawatankuasa Selia, Pentadbiran Khas atau Penasihat Bebas. Ini membolehkan Danaharta melaksanakan tanggungjawabnya tanpa dibebani oleh tindakan litigasi yang remeh dan memakan masa yang panjang.

Bearing in mind the object of the Act the constitutionality of s. 72 must be viewed with greater latitude as explained in *RK Garg v. Union of India* AIR [1981] SC 2138. Such an approach is reflected in *Charanjit Lal Chowdhury v. Union of India* AIR [1951] SC 51 where a law passed even against a single company in regard to the administration and management of its affairs was held not to violate art. 14 (our art. 8(1)). As Mukherjee J said at p. 59:

> We should bear in mind that a corporation, which is engaged in production of a commodity vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it. If its possibilities are large and it had a prosperous and useful career for a long period of time and is about to collapse not for any economic reason but through sheer perversity of the controlling authority, one cannot say that the legislature has no authority to treat it as a class by itself and make special legislation applicable to it alone and in the interest of the community at large.

As the Act itself indicates its object in the preamble and the basis of the classification is evident from the language of s. 72 it falls within the first category as classified in *Shri Ram Krishna Dalmia & Others v. Shri Justice S R Tendolkar & Others* AIR [1958] SC 538. It is clear that the Act was required in the public interest to promote the revitalisation of the nation's economy. Denial of injunctive relief is absolutely necessary to ensure that the object of the Act is not frustrated. That clearly is the purpose of s. 72 which applies to all persons in the same position as the respondent. Thus it applies equally to all persons who are similarly circumstanced. This is a reference to all persons whose assets and liabilities have been acquired by the appellant pursuant to the Act. Surely it cannot include the appellant itself for reasons which are too plain to state. Yet the Court of Appeal found that s. 72 contravenes art. 8(1) "… because it denies the appellant an opportunity to protect his immovable property by means of a temporary injunction under any circumstances whilst not placing any fetter upon the power to grant the same relief in the respondent's favour." The law that we have referred to thus far makes it clear beyond doubt that there will be a violation of art. 8(1) only if a legislation does not apply to a person who is similarly circumstanced as the other persons in the classification – and not to someone like the appellant outside it. The conclusion of the Court

of Appeal is therefore wholly unsustainable as it is a total deviation from the law regulating art. 8(1). It is therefore our unanimous view that there is a rational basis between the classification in s. 72 and its object in relation to the Act. Section 72 therefore satisfies the requirements of the reasonable classification test and is not unconstitutional. This makes it unnecessary for us to answer the second question.

In the upshot we allowed the appeal with costs here and below against the respondent and ordered that the injunctive relief granted against the appellant be vacated.